



furtherance of drug trafficking, Count Two; and 3) possession of firearms after being convicted of a felony, Count Three. (Indictment 1–2, ECF No. 3.) On April 24, 2009, Marsh pled guilty to Counts One and Two. (Plea Agreement ¶ 1, ECF No. 17.) The Court, on motion of the Government, dismissed Count Three. (Plea Agreement at ¶ 11; Sentencing Min. 1, ECF No. 25.)

In the Presentence Report (“PSR”), a Probation Officer calculated Marsh’s base offense level as 24. The Officer applied a two-point increase under United States Sentencing Guidelines (“USSG”) § 3B1.1(c) for Marsh’s role in the offense as an organizer, leader, manager, or supervisor. (PSR at ¶ 17; Worksheet A, at 1.) Marsh received a three-point reduction for timely acceptance of responsibility under USSG § 3E1.1. (*Id.* at ¶¶ 20–21; Worksheet D, at 1.) Together, the adjusted offense level of 23 and criminal history category of IV yielded a guidelines range of 70–87 months for Count One, and 60 consecutive months for Count Two. (PSR at ¶ 69.) Both offenses carried a five-year (60-month) statutory minimum. (*Id.*) On August 11, 2009, the Court sentenced Marsh to 135 months of imprisonment, consisting of 75 months for Count One and 60 months for Count Two. (J. 2, ECF No. 26.)

On January 27, 2012, Marsh, through counsel, moved for a sentence reduction under 18 U.S.C. § 3582(c)(2), based upon Amendment 750 to the United States Sentencing Guidelines. (ECF No. 32, at 2.) Marsh’s amended offense level was 17, yielding an amended guideline range of 37–46 months for Count One instead of the statutory mandatory minimum sentence of 60 months. By Order (ECF No. 34) entered on April 4, 2012, the Court granted the motion reducing Marsh’s sentence for Count One

to 60 months, totaling 120 months of imprisonment, the minimum permitted by law. On December 31, 2012, the Court received Marsh's § 2255 Motion.

## **II. Fair Sentencing Act**

Congress enacted the Fair Sentencing Act of 2010 ("FSA"),<sup>2</sup> with an effective date of August 3, 2010. *See Dorsey v. U.S.*, 132 S. Ct. 2321, 2329 (2012). Among other effects, the FSA increased the amount of crack cocaine necessary to trigger the statutory mandatory minimum sentences under 21 U.S.C. § 841(b)(1). *See id.* The *Dorsey* Court held that the FSA applies to defendants convicted for conduct occurring before the enactment of the FSA, but sentenced after the FSA went into effect on August 3, 2010. *Dorsey*, 132 S. Ct. at 2335. "[T]he FSA[, however,] does not apply retroactively to a defendant sentenced before August 3, 2010." *U.S. v. Barrett*, 572 F. App'x 195, 200 (4th Cir.), *cert. denied*, No. 14–5626, 2014 WL 3854416 (Oct. 6, 2014) (citing *U.S. v. Black*, 737 F.3d 280, 287 (4th Cir. 2013)). The Court sentenced Marsh on August 11, 2009. Accordingly, the FSA does not apply to his sentence, and Claim One will be dismissed.

## **III. Alleged Firearm Enhancement**

In Claim Two, Marsh states that "the 2-point enhancement applied at Petitioner's original sentencing for possession of a firearm" was improper because the Court convicted Marsh of possession of firearms in furtherance of drug trafficking under 18 U.S.C. § 924(c). (§ 2255 Mot. at 6.) In particular, Marsh contends that this claim is based upon "newly discovered evidence," (*id.*), as he "just recognized the error due to a recent guideline calculation worksheet done by counsel of record . . .," (*id.* at 8), in his

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<sup>2</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-120, 124 Stat. 2372.

18 U.S.C. § 3582 Motion.<sup>3</sup> Marsh is mistaken. The Court did not apply a two-point enhancement for possession of a firearm. To the contrary, the enhancement was attributed to Marsh's role in the offense as an organizer, leader, manager, or supervisor under USSG § 3B1.1(c). (PSR ¶ 17.) Indeed, the Probation Officer explicitly noted that the firearm enhancement under USSG § 2K2.4(b) was inapplicable. (PSR Worksheet A, at 2.) Accordingly, Claim Two is premised upon a faulty conclusion and will be dismissed.

### VIII. Conclusion

The § 2255 Motion (ECF No. 36) will be denied. The action will be dismissed. A certificate of appealability will be denied.<sup>4</sup>

An appropriate Final Order will follow.

*HEH*

/s/

Henry E. Hudson  
United States District Judge

Date: *Nov. 17, 2014*  
Richmond, Virginia

<sup>3</sup> Marsh's counsel, in the guideline calculation table portion of "Defendant's Motion to Reduce Sentence Pursuant to Title 18 U.S.C. §3582(c)" (ECF No. 31), misattributed the two-point enhancement Marsh received to "[p]ossession of a [f]irearm." (Def.'s Mot. to Reduce Sentence 3.)

<sup>4</sup> An appeal may not be taken from the final order in a § 2255 proceeding unless a judge issues a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1)(B). A COA will not issue unless a prisoner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requirement is satisfied only when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). Marsh has not satisfied this standard.